

COMMENTS ON DRAFT STAFF ANALYSIS
Peace Officers Procedural Bill of Rights

05-RL-4499-01

COMMENTS BY THE COUNTY OF ORANGE



I, Davis Nighswonger state:

That I am a Lieutenant with the Orange County Sheriff's Department. As of April 6, 2006, I will have been employed by this department as a sworn officer for 22 years. I am the Lieutenant assigned the department's Professional Standards Division. This division is responsible for the hiring of personnel, background checks, recruiting, human resource management, internal affairs, workers' compensation, and various employee support functions. The Professional Standards Division has other miscellaneous duties to include the issuance of concealed weapons permits and business licenses. I have been assigned to my current position since November of 2005 and previously served in the division for 2 ½ years as the Internal Affairs Sergeant.

In my current and previous position in the Professional Standards Division, I have become familiar with the Peace Officers Procedural Bill of Rights (POBOR / AB301 / Government Code 3300 to 3311). POBOR affords law enforcement officers significant rights, over and above those granted to non-sworn employees, whenever allegations of misconduct are made against them. The requirements of law enforcement agencies to investigate complaints have correspondingly increased under POBOR. While most complaints made against law enforcement officers are relatively minor affairs, investigations involving serious misconduct or criminal behavior are complex and frequently difficult matters to resolve. A key component of any internal affairs investigation is the involved officer(s) own statements. Therefore, the interrogation process is a crucial element in the resolution of any investigation.

I am concerned that the draft staff analysis does not fully comprehend or account for the requirements of interrogation governed by Government Code, Section 3303. Government Code, Section 3303 states as follows:

GC 3303. When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during

off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent.

(f) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding. This subdivision is subject to the following qualifications:

(1) This subdivision shall not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.

(2) This subdivision shall not prevent the admissibility of statements made by the public safety officer under interrogation in any civil action, including administrative actions, brought by that public safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) This subdivision shall not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) This subdivision shall not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

(g) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

(h) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

(i) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(j) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

In order to fully appreciate the requirements of POBOR and its impact on law enforcement agencies, it is important to understand the role of law enforcement officers and the expectations of modern society.

The State of California holds law enforcement officers to high standards of training, professionalism, and conduct that surpass most other states in the nation. In my nearly 22 years of experience, I've observed increasing demands for accountability and professionalism among peace officers by the public and all levels of government. Law enforcement officers are given great responsibilities and authority and are therefore entrusted to perform their duties with the highest level of competence, professionalism, and ethics possible. The citizens of California have little tolerance for peace officers who commit serious misdeeds or crimes. The public expects such allegations to be fully investigated, proper resolutions made, and appropriate discipline administered.

Law enforcement officers must exercise their authority each and every day. With the use of authority comes occasional abuses, some minor while others are major. Each year a number of law enforcement agencies in the state are rocked by controversy surrounding their officers' serious misconduct or abuse of authority. Such incidents are played out in the media frequently receiving national and worldwide attention. The stakes are very high in such incidents and sometimes result in federal intervention (violation of civil rights investigations, consent decrees), multi-million dollar civil litigation, and a breach of trust and confidence among those served.

Many of the complaints investigated against peace officers are fairly simple affairs, which do not require extraordinary effort. However, in varying degrees of frequency, every department is called upon to conduct very detailed investigations when allegations of serious misconduct occur. These investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force where injuries may be significant, serious property damage, and criminal behavior.

A key component of any investigation involves the subject officer and witnesses, who are frequently other officers. Because the "reasonableness standard" is typically applied to any evaluation of officer misconduct, it is critical that an investigation include the officer's perspective to include what he or she saw, knew, perceived at the time. This component is always needed in such things as use of force investigations where a line exists between actions that are justifiable and those that are criminal. The officer's perspective is only obtained through an interrogation of the involved officer, as well as other officers who may be witnesses. Such a perspective is seldom needed when investigating allegations against non-sworn staff.

The interrogation process can be lengthy and time-consuming especially if the allegations involve misconduct that could result in termination or criminal charges. When criminal allegations are present, some departments conduct a bifurcated investigation. The Orange County Sheriff's Department typically conducts a criminal investigation first followed by an internal affairs investigation. In most cases, criminal investigators are unable to obtain the officer's perspective because he or she will invoke their *Miranda*

rights, and decline to give a statement. If reviewed by the District Attorney's Office for criminal filing, the criminal investigation typically lacks this critical component.


The officer's perspective is usually obtained through an internal affairs investigation where he or she is compelled to give a statement via the *Lybarger* admonishment. The officer is subject to insubordination and potential termination if he or she declines to answer questions. Such questions are confrontational and interviews can become very difficult especially if the officer is accompanied by an obstructionist representative who is typically an employee association representative or attorney. Ultimately though, the internal affairs investigation tends to be more thorough and complete than a criminal investigation since statements are obtained from all involved officers.

Interviews with non-sworn employees are seldom as contentious or difficult. Non-sworn employees have rights as well, but the incidents they are involved in are not as difficult to resolve and inherently lack the controversy associated with incidents involving sworn personnel. Further, non-sworn employees are seldom held to the standards of peace officers. Because they lack the authority given to peace officers and are almost never involved in high-risk activities, their actions are rarely scrutinized at the level of their sworn counterparts. The expectations of the public are much less and misconduct on the part of non-sworn staff rarely merits significant media attention.

As noted in the draft staff analysis, reimbursement is provided to those activities that extend beyond the scope of those provided to non-sworn staff. However, this approach is far too simplistic and fails to consider the complexity and consumption of resources when serious misconduct on the part of peace officers occurs. Whenever a serious incident occurs where misconduct is perceived, focus can readily expand to include other officers and the department as a whole. Questions such as, why was this person hired, were policies deficient, was there a lapse in supervision, did management or administration fail to set proper policies, did the department fail to issue clear directives, and did the department fail to enforce its rules and regulations could readily arise. Serious cases also tend to involve lengthy appeals processes that require delicate handling due to the increased rights under POBOR. A single technical error in POBOR can overturn discipline even to the extent of reinstating an officer terminated for good cause.

I encourage the committee to consider the increasingly burdensome task of investigating officer misconduct while affording rights under POBOR before establishing reimbursement protocol. California continues to lead the nation in law enforcement-related matters. Our state has made great strides in ensuring the fair and just treatment of officers when allegations of misconduct are made. However, with new laws and protections come added responsibilities that consume resources. I encourage the state to establish a balanced reimbursement plan that not only promotes the thorough and complete investigation of officer misconduct but also considers the added burden placed on law enforcement agencies by POBOR.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 15th day of March, 2006 at Santa Ana, California.



Davis Nighswonger